

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 4, 2004 Session

ADA TRAVIS v. BLAISE FERRARACCIO ET AL.

**Appeal from the Circuit Court for Montgomery County
No. C12-458 Ross H. Hicks, Judge**

No. M2003-00916-COA-R3-CV - Filed September 19, 2005

This appeal involves the medical care a now deceased patient received after he severely injured himself in an accident at home. The patient and his wife filed a medical malpractice action in the Circuit Court for Montgomery County against the emergency room physician, the staff physician, and the neurologist who treated him immediately after the accident. Two of the physicians and their employer filed a motion for summary judgment supported by the two physicians' affidavits that the care they rendered the patient was consistent with the applicable standard of care. After the patient died from a heart attack unrelated to this litigation, the patient's wife opposed the summary judgment motion with depositions from two out-of-state physician experts and an affidavit from one of them concluding that the conduct of the two defendant physicians violated the standard of care and had caused their patient to suffer permanent quadriplegia. The trial court concluded that the testimony of the wife's experts was inadmissible under the locality rule and granted the summary judgment motion. The court thereafter denied the wife's motion to alter or amend which was accompanied by affidavits from both of her experts and certified the order as final pursuant to Tenn. R. Civ. P. 54.02. The patient's wife has appealed. We have concluded that the trial court erred by excluding one of the wife's expert witnesses. Accordingly, we vacate the summary judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part,
Reversed in Part, and Remanded**

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

David Randolph Smith and Edmund J. Schmidt, III, Nashville, Tennessee, for the appellant, Ada Travis.

Clisby Hall Barrow, Nashville, Tennessee, and for the appellees, Blaise Ferraraccio, Thomas L. Ely, and Premier Medical Group, P.C.

OPINION

I.

On June 18, 1996, Charles L. Travis, then fifty-eight years old, fell and seriously injured himself while walking into his home. Mr. Travis was intoxicated at the time. His son discovered

him sometime later and immediately called Montgomery County Emergency Medical Services. The EMTs rushed Mr. Travis to the emergency room at Clarksville Memorial Hospital. Mr. Travis arrived at the hospital at approximately 8:18 p.m. and was examined by Dr. Robert J. Doty, an emergency room physician on duty at the time. Dr. Doty diagnosed Mr. Travis with acute quadriplegia and ordered X-rays of Mr. Travis's face and cervical spine, as well as a CT scan of his head. Dr. Doty did not order a CT scan of Mr. Travis's cervical spine. The X-rays and CT scan ordered by Dr. Doty revealed no abnormalities. Clarksville Memorial Hospital did not have the equipment needed to perform an MRI scan.

At 2:40 a.m. on June 19, 1996, approximately six hours after Mr. Travis's arrival at the emergency room, Dr. Thomas L. Ely admitted Mr. Travis to the hospital. At approximately 8:00 a.m., Dr. Ely ordered a neurological consult even though he had not yet personally evaluated Mr. Travis. At approximately 3:30 p.m., Dr. Blaise Ferraraccio, a neurologist, examined Mr. Travis and ordered a nerve conduction study. Dr. Ferraraccio did not order a CT scan of Mr. Travis's cervical spine or order that he be transferred to Nashville for an MRI scan. Dr. Ferraraccio eventually diagnosed Mr. Travis with Guillain-Barré Syndrome and began treating him for that disorder.¹ Mr. Travis's acute quadriplegia continued unabated during his treatment by Dr. Ferraraccio.

Several weeks later, Mr. Travis was transferred to Tennessee Christian Medical Center in Nashville for rehabilitation. The neurologist who examined Mr. Travis upon his arrival immediately suspected that Mr. Travis had suffered a spinal cord injury and referred him to a neurosurgeon, Dr. Arthur R. Cushman, to confirm his diagnosis. An MRI scan showed that Mr. Travis had a herniated disc at C-3/C-4 that was causing spinal cord compression. Although the initial spinal cord damage was beyond repair at that point, Dr. Cushman performed a discectomy with fusion at C-3/C-4 in hopes of alleviating some of the peripheral paralysis Mr. Travis was suffering. Unfortunately, Mr. Travis showed little improvement.²

On June 18, 1997, Mr. Travis and his wife, Ada Travis, filed a complaint for negligence in the Circuit Court for Montgomery County. The Travises named as defendants Drs. Doty, Ely, and Ferraraccio, Clarksville Emergency Physicians, Premier Medical Group, P.C., Clarksville Memorial Hospital, and Clarksville Regional Health Systems, Inc.³ The defendants filed answers denying the claims of negligence, and Ms. Travis later filed an amended complaint to add a survival claim following Mr. Travis's death.

As discovery proceeded, the Travises disclosed in accordance with Tenn. R. Civ. P. 26.02(4)(A)(i) that they intended to call Dr. David A. Krendel of Lawrenceville, Georgia and Dr. Bernard Abrams of Kansas City, Missouri as experts to testify that the treatment that Mr. Travis had received from Drs. Ely and Ferraraccio in June 1996 fell below the recognized standard of

¹Guillain-Barré Syndrome is a rare, progressive neurological disorder that can cause weakness and paralysis of the legs, arms, and other parts of the body.

²Mr. Travis remained in a quadriplegic state for approximately five-and-one-half years until February 27, 2002, when he died from an unrelated heart attack.

³Clarksville Emergency Physicians employed Dr. Doty. Premier Medical Group employed Drs. Ely and Ferraraccio. Clarksville Regional Health Systems, Inc. owned and operated Clarksville Memorial Hospital.

professional practice for physicians and neurologists practicing in Clarksville, Tennessee or similar communities. After deposing both Drs. Krendel and Abrams, Drs. Ely and Ferraraccio and Premier Medical Group filed a motion for summary judgment, supported by the physicians' own affidavits, asserting that their treatment of Mr. Travis was entirely consistent with the applicable standard of care. They also asserted that Drs. Krendel and Abrams had failed to demonstrate, as required by Tenn. Code Ann. § 29-26-115(a)(1) (Supp. 2004), that they were familiar with the recognized standard of professional practice applicable to Drs. Ely's and Ferraraccio's practices in Clarksville or in similar communities when they treated Mr. Travis in 1996.

Ms. Travis argued in response to the summary judgment motion that Drs. Krendel and Abrams were applying the standards of care in Dalton, Georgia and St. Joseph, Missouri⁴ which were similar to Clarksville and that neither Dr. Krendel nor Dr. Abrams was applying a national standard of care. The trial court determined that the deposition testimony of Drs. Krendel and Abrams, as well as the affidavit by Dr. Abrams, did not satisfy the requirements of Tenn. Code Ann. § 29-26-115(a)(1) and that Ms. Travis would be unable to prove that Drs. Ely and Ferraraccio violated the applicable standard of professional conduct without this evidence. Accordingly, the court granted the summary judgment.

Ms. Travis filed a timely Tenn. R. Civ. P. 59.04 motion to alter or amend. She attached to her motion an affidavit from Dr. Krendel and a new affidavit from Dr. Abrams. In its memorandum opinion and subsequent order denying the motion, the trial court first observed that it would be justified in declining to consider these affidavits because Ms. Travis had failed to meet the requirements for the presentation of new evidence. Nevertheless, the trial court considered the affidavits. The court concluded that Dr. Krendel had still failed to demonstrate that Dalton and Clarksville were similar or that he had applied the standard of care in Dalton in assessing the conduct of Drs. Ely and Ferraraccio. The court also concluded that Dr. Abrams's second affidavit still failed to establish the similarity of St. Joseph and Clarksville in 1996 and noted that Dr. Abrams's second affidavit only reinforced the court's concern that Dr. Abrams's testimony was "inherently unreliable."

The trial court designated its order granting the motion for summary judgment as final under Tenn. R. Civ. P. 54.02. Ms. Travis perfected an appeal from the order dismissing her claims against Drs. Ely and Ferraraccio and their employer and raises two arguments. First, she asserts that the trial court erred by declining to consider the supplemental affidavits submitted by Drs. Krendel and Abrams. Second, she insists that the trial court erred by excluding the testimony of Drs. Krendel and Abrams regarding the acceptable standard of professional practice applicable to Drs. Ely and Ferraraccio. We have determined that Ms. Travis's first argument is without merit because the trial court's order denying her Tenn. R. App. P. 59.04 motion clearly reflects that the trial court actually considered the supplemental affidavits submitted by Drs. Krendel and Abrams. We have also

⁴At his deposition, Dr. Abrams did not base his opinions on his knowledge of the standard of care in St. Joseph. However, in his affidavit attached to Ms. Travis's opposition to the summary judgment motion, Dr. Abrams claimed that he was familiar with the standard of professional practice in St. Joseph, that St. Joseph was similar to Clarksville, and that the treatment Mr. Travis received from Drs. Ely and Ferraraccio fell below the acceptable standard of professional practice in St. Joseph as it existed in 1996. Ms. Travis did not file a similar affidavit from Dr. Krendel with her opposition to the summary judgment motion.

determined that the trial court correctly excluded Dr. Krendel's testimony but erred by excluding Dr. Abrams's testimony.

II.

EVIDENTIARY STANDARDS FOR MEDICAL MALPRACTICE CLAIMS

Medical malpractice claims must meet strict substantive and procedural requirements. *Hessmer v. Miranda*, 138 S.W.3d 241, 244 (Tenn. Ct. App. 2003). Subject to the "common knowledge" exception that is inapplicable here, a plaintiff filing a medical malpractice action cannot recover unless he or she presents competent expert evidence establishing each of the three statutory elements of a medical malpractice claim. Tenn. Code Ann. § 29-26-115; *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86, 92 (Tenn. 1999). Specifically, the plaintiff must present expert evidence: (1) establishing the applicable standard of care; (2) demonstrating that the defendant's conduct fell below that standard of care; and (3) showing that the defendant's conduct proximately caused injuries that would not otherwise have occurred. Tenn. Code Ann. § 29-26-115(a)(1)-(3). *Gunter v. Lab. Corp. of Am.*, 121 S.W.3d 636, 640 (Tenn. 2003); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 226 (Tenn. Ct. App. 1999).

As this court has previously noted, it is now commonplace for defendants in medical malpractice cases to file motions for summary judgment to test the strength of their adversary's case. *Hessmer v. Miranda*, 138 S.W.3d at 244; *Kenyon v. Handal*, 122 S.W.3d 743, 758 (Tenn. Ct. App. 2003). Defendant medical professionals generally support their summary judgment motions with their own affidavits stating that, in their own professional opinion, their actions neither violated the applicable standard of professional practice nor caused the complained-of injury. *Hessmer v. Miranda*, 138 S.W.3d at 244; *Kenyon v. Handal*, 122 S.W.3d at 758 & n.14. Affidavits of this sort effectively negate the allegations of negligence in the medical malpractice plaintiff's complaint and force the plaintiff to demonstrate the existence of a genuine, material factual dispute that warrants a trial. *Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 438 (Tenn. 1998); *Dunham v. Stones River Hosp., Inc.*, 40 S.W.3d 47, 51 (Tenn. Ct. App. 2000).

Demonstrating the existence of a genuine, material factual dispute can be challenging in a medical malpractice case. A plaintiff faced with a properly supported summary judgment motion cannot rest on the allegations in the complaint, Tenn. R. Civ. P. 56.06; *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Blocker v. Reg'l Med. Ctr.*, 722 S.W.2d 660, 661 (Tenn. 1987), but instead must demonstrate the existence of triable factual disputes by either: (1) pointing to evidence ignored or overlooked by the defendants; (2) rehabilitating evidence attacked by the defendants; or (3) producing additional evidence establishing the existence of a genuine factual issue, *Kenyon v. Handal*, 122 S.W.3d at 758.

In other words, the plaintiff must point to or produce expert testimony establishing the applicable standard of care, the defendant's violation of that standard, and a causal connection between the defendant's conduct and the plaintiff's injury. *Hessmer v. Miranda*, 138 S.W.3d at 244.⁵ The plaintiff who is unable to do so faces almost certain dismissal of the complaint, because the

⁵If necessary, the plaintiff may file a properly supported motion under Tenn. R. Civ. Proc. 56.07 seeking a continuance to enable him or her the time to obtain expert deposition or affidavit testimony.

defendant has effectively negated one or more essential elements of the plaintiff's case. Without opposing expert testimony, the plaintiff cannot demonstrate the existence of a genuine factual dispute regarding whether the defendant breached the applicable standard of professional practice or caused the plaintiff's injuries. *Hessmer v. Miranda*, 138 S.W.3d at 244; *Mabon v. Jackson-Madison County Gen. Hosp.*, 968 S.W.2d 826, 831 (Tenn. Ct. App. 1997).

Expert testimony used either to support or to oppose a summary judgment motion in a medical malpractice case must be admissible at trial. *Byrd v. Hall*, 847 S.W.2d at 215-16; Tenn. R. Civ. P. 56.06. If the evidence opposing a properly supported motion for summary judgment is inadmissible, the motion will be granted. As the Tennessee Supreme Court has explained, "[t]o permit an opposition to be based on evidence that would not be admissible at trial would undermine the goal of the summary judgment process to prevent unnecessary trials since inadmissible evidence could not be used to support a jury verdict." *Byrd v. Hall*, 847 S.W.2d at 216.

In order for an expert opinion to be admissible in a medical malpractice case, the person offering the opinion must, like any other expert, demonstrate that he or she is qualified to render an opinion⁶ and that his or her opinion will substantially assist the trier of fact.⁷ In addition to these general requirements, a person offering an expert opinion in a medical malpractice case must demonstrate that he or she satisfies certain geographic and durational residency requirements and that he or she practices in a profession or specialty that makes the expert's opinion relevant to the issues in the case. Tenn. Code Ann. § 29-26-115(b); *Church v. Perales*, 39 S.W.3d 149, 166 (Tenn. Ct. App. 2000).

As a result, in a case such as this one, the trial court must engage in a two-step process. First, the court must determine whether the evidence relied on by the plaintiff in opposing the summary judgment motion would be admissible at trial. *United States v. Hangar One, Inc.*, 563 F.2d 1155, 1157 (5th Cir. 1977). If it would not be admissible, the defendant's summary judgment motion should be granted. If, however, some or all of the plaintiff's evidence would be admissible at trial, the court must then proceed to the next step of the summary judgment process and determine whether, "tak[ing] the strongest legitimate view of the evidence in favor of the [plaintiff], allow[ing] all reasonable inferences in favor of that party, and discard[ing] all countervailing evidence," there remain any genuine issues of material fact to be decided at trial. *Byrd v. Hall*, 847 S.W.2d at 210-11. The trial court's evidentiary decisions are thus anterior to, and separate from, the trial court's determination of whether there exists a genuine issue of material fact that would preclude a grant of summary judgment in favor of the defendant. *General Elec. Co. v. Joiner*, 522 U.S. 136, 143, 118 S.Ct. 512, 517 (1997); *Rhodehouse v. Stutts*, 868 P.2d 1224, 1227 (Idaho 1994).

In deciding whether to admit the plaintiff's expert testimony for purposes of ruling on the summary judgment motion, the trial court must employ the same standards it would use in deciding whether to admit the expert testimony at trial or in response to a motion for a directed verdict or a motion for judgment as a matter of law. Tenn. R. Civ. P. 56.06 ("Expert opinion affidavits shall be governed by Tennessee Rule of Evidence 703"); *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997)

⁶Tenn. R. Evid. 104(a).

⁷Tenn. R. Evid. 702.

(“[t]he principles governing admissibility of evidence do not change on a motion for summary judgment”); *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 650 n.3 (5th Cir. 1992) (“the admissibility of evidence on a motion for summary judgment is subject to the same standards and rules that govern admissibility of evidence at trial”). Specifically, the proposed expert testimony must satisfy the relevancy test of Tenn. R. Evid. 401⁸ and the strictures of Tenn. R. Evid. 702 and 703.⁹ *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 264 & n.8 (Tenn. 1997); *DeVore v. Deloitte & Touche*, No. 01A01-9602-CH-00073, 1998 WL 68985, at *9 (Tenn. Ct. App. Feb. 20, 1998) (No Tenn. R. App. P. 11 application filed) (“Trial courts perform a gatekeeping function to make sure that expert and scientific evidence has the level of relevancy and reliability required by Tenn. R. Evid. 401, 702, and 703”).

As with most other evidentiary questions, the admissibility of expert opinion testimony is a matter which largely rests within the sound discretion of the trial court. *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002); *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997); *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d at 263. Nevertheless, the trial court’s decision “is not insulated from appellate review . . . and may be overturned on appeal upon a showing that the trial court abused its discretion.” *State v. Shuck*, 953 S.W.2d at 669. The appellate court will find an abuse of discretion when it appears that the trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning, that caused an injustice to the party complaining. *State v. Stevens*, 78 S.W.3d at 832; *State v. Shuck*, 953 S.W.2d at 669. A trial court’s denial of a Tenn. R. Civ. P. 59.04 motion to alter or amend a judgment will also be reversed on appeal only for an abuse of discretion. *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003); *Chambliss v. Stohler*, 124 S.W.3d 116, 120 (Tenn. Ct. App. 2003).

III. THE EXCLUSION OF DR. DAVID A. KRENDEL’S TESTIMONY

We turn first to the exclusion of the testimony of Dr. Krendel, the neurologist in private practice in Lawrenceville, Georgia. The trial court excluded this testimony on two grounds. First, the court determined that the record did not contain evidence that Dalton, the community Dr. Krendel believed to be similar to Clarksville, was in fact similar. Second, the court decided that, even if the record contained evidence establishing similarities between Dalton and Clarksville, “there is nothing in the record to indicate that Dr. Krendel is applying the standard of care for Dalton, in

⁸Tenn. R. Evid. 401 provides as follows: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

⁹Tenn. R. Evid. 702 provides that “[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.” Tenn. R. Evid. 703 reads as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

assessing the conduct of Drs. Ely and Ferraraccio.” After reviewing Dr. Krendel’s deposition testimony and affidavit, we agree with the trial court’s conclusion that he did not base his opinions regarding the treatment Drs. Ely and Ferraraccio provided to Mr. Travis on the standard of care applicable to Dalton.

A.

The Tenn. R. Civ. P. 26 disclosure regarding Dr. Krendel stated that he was “familiar with the recognized standard of acceptable professional practice in the field of neurology in Clarksville, Tennessee or similar communities as it applied in June, 1996,” as well as “the standard of care for attending physicians such as Dr. Ely.” It explained that Dr. Krendel had reviewed demographic information regarding the community of Clarksville and the medical community in particular and that he was aware of the number of licensed beds and active physicians in Clarksville’s two hospitals in 1995. It also stated that Dr. Krendel had attended national meetings of neurologists.

With regard to the substance of Dr. Krendel’s proposed testimony, the Tenn. R. Civ. P. 26 disclosure stated that Dr. Krendel would testify that Dr. Ferraraccio failed to comply with the recognized standard of professional practice in Clarksville in June 1996 by failing to order or obtain a CT scan or an MRI scan of Mr. Travis’s cervical spine, by failing to consider the possibility of spinal cord injury, and by misdiagnosing Mr. Travis with Guillain-Barré Syndrome. He would testify that Dr. Ely breached the applicable standard of care by failing to order a neurological consult earlier. Dr. Krendel was also prepared to testify that had Drs. Ely and Ferraraccio acted properly, Mr. Travis’s spinal cord injury would have been quickly identified, Mr. Travis would have undergone corrective surgery immediately, and this surgery would more than likely have prevented his permanent quadriplegia.

When the defendant physicians deposed Dr. Krendel, he admitted that he had never been to Clarksville and that he did not have firsthand knowledge regarding the standard of acceptable professional practice in Clarksville itself. However, he insisted that he was familiar with the standards of professional practice in cities “similar” to Clarksville. When asked to identify the “small towns in the region” he believed to be similar to Clarksville, Dr. Krendel mentioned Anderson, South Carolina; Spartanburg, South Carolina; Cookeville, Tennessee; and Dalton, Georgia. However, he had difficulty explaining how he had concluded that the medical practices in these communities were similar to Clarksville.

Dr. Krendel conceded during his deposition that he did not know the nearest facility where Mr. Travis could have obtained an MRI scan in 1996. While he claimed to have seen information regarding the number of hospitals and physicians in Clarksville, he admitted that he could not remember it. He was aware of Clarksville’s population, but only because the Travises’ lawyer had reminded him of it immediately before the deposition. Most significantly, Dr. Krendel testified that none of the information he had seen regarding Clarksville was material to him in forming his opinion regarding the standard of care applicable to Dr. Ferraraccio.

When asked to state more specifically the basis for his testimony regarding the applicable standard of care, Dr. Krendel said that he had taught at Emory University Medical School in Atlanta for fifteen years and that during that time he had done consultations for neurologists all over the

region, including Tennessee and small towns in Georgia. He stated that he had reviewed medical records and notes from neurologists in those places and that he was “very familiar with the standard of care in small towns in the region.” He claimed that the standard of acceptable neurological practice in Clarksville at the time Mr. Travis was treated was the same as it would have been at Emory and that the minimum standard of acceptable neurological practice was the same nationwide.

Based on Dr. Krendel’s testimony, Drs. Ely and Ferraraccio claimed that Dr. Krendel had failed to demonstrate that he was familiar with the minimum standard of acceptable professional practice in Clarksville or in similar communities and that he was instead relying on an impermissible national standard of care. Ms. Travis responded that Dr. Krendel had not based his opinions on a national standard of care but rather on the standard of care in Dalton, a community that is similar to Clarksville. She also provided the court with unsworn demographic information about Dalton that she believed substantiated her claim that Dalton and Clarksville were similar communities.

Based on this evidence, the trial court concluded that Dr. Krendel had failed to demonstrate that Dalton and Clarksville were similar communities and, even if he had, that there is nothing in the record to indicate that Dr. Krendel had applied the standard of care for Dalton in assessing the conduct of Drs. Ely and Ferraraccio. The trial court therefore held that Dr. Krendel’s testimony was inadmissible and proceeded to grant a summary judgment to Drs. Ely and Ferraraccio.

Ms. Travis thereafter filed a Tenn. R. Civ. P. 59.04 motion to alter or amend this judgment. In support of her motion, Ms. Travis submitted an affidavit by Dr. Krendel. In this affidavit, Dr. Krendel stated that the demographic information regarding Dalton that had already been submitted to the court by Ms. Travis in her opposition to the summary judgment motion was accurate and that, based on this information, he had concluded that Dalton was substantially similar to Clarksville. The affidavit did not state that the conduct of Drs. Ely and Ferraraccio fell below the minimum standard of acceptable professional practice in Dalton. In their response to Ms. Travis’s 59.04 motion, Drs. Ely and Ferraraccio argued that even if Dr. Krendel was familiar with the standard of care in Dalton, there was no indication that he applied it in evaluating the treatment they provided to Mr. Travis.

When the trial court considered Ms. Travis’s Tenn. R. Civ. P. 59.04 motion, it noted that it would have been justified in refusing to consider Dr. Krendel’s affidavit because Ms. Travis had failed to meet the requirements for the consideration of new evidence. However, even after considering Dr. Krendel’s affidavit, the court concluded the record still contained no evidence that Dalton and Clarksville were similar communities or that Dr. Krendel was applying the standard of care for Dalton in assessing the conduct of Drs. Ely and Ferraraccio.

B.

We have reviewed Dr. Krendel’s deposition testimony in the light most favorable to Ms. Travis. Based on a fair reading of the deposition, we have reached the same conclusion that the trial court did. When Dr. Krendel gave his deposition, he did not appear to be relying on his understanding of the standard of care in Dalton to assess Dr. Ely’s and Dr. Ferraraccio’s treatment of Mr. Travis. Given that the trial court had no other testimony from Dr. Krendel when it was considering the summary judgment motion, the trial court did not abuse its discretion in finding that Dr. Krendel’s testimony was inadmissible at that point.

Dr. Krendel's affidavit submitted along with Ms. Travis's Tenn. R. Civ. P. 59.04 motion does not alter this result. This affidavit addresses only the trial court's concern regarding the lack of evidence that Dalton's medical community was similar to Clarksville's. It contains nothing new indicating that Dr. Krendel was applying, or could have been applying, the standard of acceptable professional practice in Dalton when he testified in his deposition regarding the standard of care applicable to Drs. Ely and Ferraraccio and their alleged breach of that standard. Thus, Ms. Travis failed, both in her opposition to the summary judgment motion and in her motion to alter or amend the judgment, to establish that Dr. Krendel's opinions regarding the applicable standard of care and the breach of that standard could "properly be applied to the facts at issue" in this case. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d at 258. Accordingly, the trial court did not abuse its discretion in excluding Dr. Krendel's testimony and denying Ms. Travis's motion to alter or amend the judgment based on Dr. Krendel's new affidavit.

IV. THE EXCLUSION OF DR. BERNARD ABRAMS'S TESTIMONY

We now turn to the exclusion of the testimony of Dr. Abrams, the neurologist who was in private practice in Kansas City, Missouri in 1996. The trial court excluded Dr. Abrams's testimony on two grounds. First, the court determined that Dr. Abrams had failed to establish that St. Joseph and Clarksville were similar communities in 1996 because the demographic data relied upon by Dr. Abrams was from the year 2000. The court also concluded that Dr. Abrams's conclusion that St. Joseph was similar to Clarksville was "inherently unreliable" because it conflicted with his earlier admission that he was unfamiliar with the actual standard of care in Clarksville. We have determined that the trial court erred by excluding Dr. Abrams's testimony.

A.

Like the Tenn. R. Civ. P. 26 disclosure regarding Dr. Krendel, the disclosure regarding Dr. Abrams stated that he too was familiar with the recognized standard of professional practice in Clarksville or similar communities in June 1996 for neurologists such as Dr. Ferraraccio and emergency room and attending physicians such as Dr. Ely. The disclosure stated that Dr. Abrams had reviewed demographic information regarding the community of Clarksville and the medical community in particular, that he was aware of the number of licensed beds and active physicians in Clarksville's two hospitals in 1995, and that he, like Dr. Krendel, had attended national meetings of neurologists. In addition, Dr. Abrams's disclosure stated that he had reviewed Yellow Page advertisements indicating the types of specialty practices available in Clarksville and that he had discussed with other neurologists the nature of medical care in Tennessee cities and communities similar to Clarksville.

Like the disclosure involving Dr. Krendel, the Tenn. R. Civ. P. 26 disclosure stated that Dr. Abrams would testify that Drs. Ely and Ferraraccio failed to comply with the recognized standard of acceptable professional practice in Clarksville in June 1996. He would testify that Dr. Ely breached the standard of care by failing to order a neurological or neurosurgery consult or an immediate transfer to a spinal cord center. He was prepared to testify that Dr. Ferraraccio breached the standard of care by failing to order or obtain a CT scan or MRI scan of Mr. Travis's cervical spine, by failing to consider the possibility of spinal cord injury, and by misdiagnosing Mr. Travis

with Guillain-Barré Syndrome. Finally, Dr. Abrams was prepared to testify that had Drs. Ely and Ferraraccio acted consistently with the applicable standard of care, Mr. Travis's spinal cord injury would have been quickly identified, corrective surgery would have been performed immediately, and the surgery would, more likely than not, have prevented Mr. Travis's permanent paralysis.

The defendants deposed Dr. Abrams just as they deposed Dr. Krendel. While Dr. Abrams recited more demographic information about Clarksville than Dr. Krendel had been able to recite, he asserted that none of the demographic information regarding Clarksville that he had reviewed had any influence on his opinions in the case. He stated that "the standard of care for a neurologist in an area like Clarksville either is you have to be able to do it, or you have to be able to refer it." When asked the basis for his opinion that such a standard of care applied in Clarksville, Dr. Abrams admitted that his opinion was based on his understanding of "a national minimum standard."¹⁰ Dr. Abrams was asked if there was any community other than Kansas City, Missouri for which he had independent knowledge of the standard of care. Dr. Abrams named only one community – Clinton, Missouri. He also conceded that the standard of care in Clinton was not substantially similar to the standard of care in Clarksville because Clinton was so much smaller than Clarksville.

Based on Dr. Abrams's deposition, Drs. Ely and Ferraraccio claimed that Dr. Abrams, like Dr. Krendel, was unfamiliar with the standard of care in Clarksville or similar communities and that his opinions were actually based on a national standard of care. Ms. Travis responded that Dr. Abrams had not based his opinions on a national standard and filed an affidavit by Dr. Abrams in support of her argument. Dr. Abrams said in his affidavit that St. Joseph, Missouri – which he had not mentioned at his deposition – was a community similar to Clarksville, that he was familiar with the standard of acceptable professional practice in St. Joseph, and that the conduct of Drs. Ely and Ferraraccio violated the standard of acceptable professional practice in St. Joseph as it existed in 1996. Dr. Abrams attached two exhibits to his affidavit. The first exhibit consisted of demographic information about Clarksville in 1996, and the second contained similar information about St. Joseph in 2000.

In granting Dr. Ely's and Dr. Ferraraccio's summary judgment motion, the trial court decided that Dr. Abrams's testimony, like that of Dr. Krendel, was inadmissible. The court found that the statement in Dr. Abrams's affidavit that St. Joseph was similar to Clarksville was "inherently unreliable" because Dr. Abrams had admitted in his earlier deposition that he had no knowledge of the actual standard of care in Clarksville. The court also determined that demographic information attached to Dr. Abrams's affidavit showed at best that St. Joseph and Clarksville were similar in 2000, rather than in 1996 when Drs. Ely and Ferraraccio treated Mr. Travis.

¹⁰The mere mention of a "national standard of care" at any point in an expert's testimony does not require the automatic exclusion of that expert in a medical malpractice case. *Stovall v. Clarke*, 113 S.W.3d at 722; *Robinson v. LeCorps*, 83 S.W.3d 718, 724 (Tenn. 2002). As long as the expert testifies that he or she is familiar with the standard of professional care in the defendant's community or a similar community and that the defendant's conduct fell below that standard, the fact that the expert also testified that the defendant's conduct fell below a minimum national standard of care is legally irrelevant both to the admissibility of the expert's testimony and to the plaintiff's case generally. *Hunter v. Ura*, 163 S.W.3d 686, 707-08 (Tenn. 2005).

Ms. Travis filed another affidavit by Dr. Abrams in support of her motion to alter or amend the summary judgment. This second affidavit reiterated Dr. Abrams's earlier claim that he was familiar with the professional standard of care in neurology in St. Joseph in 1996 because of referrals he had received from physicians there and because of his attendance at medical seminars and meetings where he discussed the standard of care in St. Joseph with physicians who practiced there. He also attempted to bolster his claim that Clarksville and St. Joseph were similar communities in 1996 by attaching several exhibits to his affidavit, including population statistics for St. Joseph between 1990 and 2000.

In their opposition to Ms. Travis's motion to alter or amend the summary judgment, Drs. Ely and Ferraraccio asserted that Dr. Abrams's second affidavit was as unreliable as his first one. Following a hearing, the trial court found that Dr. Abrams's second affidavit only increased its concern that Dr. Abrams's testimony regarding the similarities between St. Joseph and Clarksville was "inherently unreliable." The court also found that, at most, Dr. Abrams's second affidavit established that St. Joseph and Clarksville were similar in 2000, rather than in 1996 when Mr. Travis was treated. Accordingly, the trial court denied the motion to alter or amend the judgment.

B.

While we have already concluded that the trial court did not err by excluding Dr. Krendel's testimony, Dr. Abrams's testimony is another matter entirely. The court excluded Dr. Abrams's testimony for two reasons. First, the court determined that Dr. Abrams's conclusion that St. Joseph and Clarksville were similar communities was "inherently unreliable" because of his earlier concession that he was unaware of the actual standard of acceptable professional practice in neurology in Clarksville. Second, the court determined that the demographic and statistical information upon which Dr. Abrams relied failed to establish that St. Joseph and Clarksville were similar in 1996.

The trial court's analysis with regard to its first reason is flawed. Tenn. Code Ann. § 29-26-115 does not require a plaintiff's expert to be familiar with the standard of acceptable professional practice in the defendant's own community in order to be able to testify as to the applicable standard of care. Instead, Tenn. Code Ann. § 29-26-115(a)(1) provides that in order to prevail on a claim for medical malpractice, the plaintiff must prove, by expert evidence, the recognized standard of acceptable professional practice "in the community in which the defendant practices *or in a similar community*." (emphasis added). By requiring the plaintiff's expert to establish familiarity with the standard of care in the defendant's actual community as a prerequisite to allowing the expert to testify that he was familiar with the standard of care in a community similar to that of the defendants, the trial court essentially deleted from the statute the five words italicized in the preceding quote.

To be sure, a plaintiff who chooses to meet his or her burden of proof by establishing the standard of acceptable professional practice in a similar community "necessarily must prove that community is similar to the one in which the defendant practices." *Mabon v. Jackson-Madison County Gen. Hosp.*, 968 S.W.2d at 831; *Roberts v. Bicknell*, 73 S.W.3d 106, 113 (Tenn. Ct. App. 2001). This court has stated on several occasions that a plaintiff's expert can establish that a community with which he or she is familiar is similar to that of the one in which the defendant practices based on a comparison of information such as the size, location, and presence of teaching

hospitals in the two communities. *See, e.g., Roberts v. Bicknell*, 73 S.W.3d at 114; *Sandlin v. Univ. Med. Ctr.*, No. M2001-00679-COA-R3-CV, 2002 WL 1677716, at *6 (Tenn. Ct. App. July 25, 2002), *perm. app. denied* (Tenn. Dec. 2, 2002). We have never held that a plaintiff's expert must be familiar with the actual standard of professional practice in the defendant's own community in order to be able to testify that the defendant's community is similar to another community with which the expert is familiar. To do so would contradict the express wording of the statute. Therefore, the trial court erred by applying an incorrect legal standard in determining the admissibility of Dr. Abrams's testimony.

The trial court's second basis for excluding Dr. Abrams's testimony is likewise flawed. Because the demographic and statistical information attached to Dr. Abrams's initial affidavit in opposition to the summary judgment motion was not from 1996 alone,¹¹ the trial court apparently concluded that his testimony that Clarksville and St. Joseph were similar communities in 1996 was so "inherently unreliable" that it should be excluded from consideration by the trier of fact. The trial court impermissibly invaded the province of the trier of fact by making this determination.

A plaintiff in a medical malpractice case must prove by expert testimony the standard of acceptable professional practice in the defendant's community or a similar community at the time the alleged injury or wrong took place. Tenn. Code Ann. § 29-26-115(a)(1). This does not mean, however, that an expert testifying that a community is similar to that of the defendant must support his or her testimony solely with data from the year in which the treatment was provided. A reasonable trier of fact could well conclude from the information provided by Dr. Abrams in his initial affidavit that the medical community of St. Joseph was more likely than not similar to that of Clarksville in 1996 when Drs. Ely and Ferraraccio were treating Mr. Travis. *State v. Stevens*, 78 S.W.3d at 834 ("the court may make a finding of reliability if the expert's conclusions are sufficiently straightforward and supported by a rational explanation which reasonable persons could accept as more correct than not correct"). The small temporal difference between the statistics for Clarksville and the statistics for St. Joseph does not represent the sort of "analytical gap" that would justify the exclusion of Dr. Abrams's expert testimony at a stage of the process where the trial court is determining admissibility alone. *State v. Stevens*, 78 S.W.3d at 834 (quoting *General Elec. Co. v. Joiner*, 522 U.S. at 146, 118 S.Ct. at 519).

Moreover, Dr. Abrams provided testimony in his affidavit that "connected the dots" between the 1996 and 1997 statistical information for Clarksville and the 2000 statistical information for St. Joseph. Dr. Abrams stated that he was familiar with the medical community in St. Joseph in 1996 because of the many patient referrals he had received from St. Joseph and his attendance at meetings and seminars where he discussed the practice of medicine in St. Joseph with physicians from there. Thus, Dr. Ely's and Dr. Ferraraccio's arguments regarding the significance of the temporal difference

¹¹Dr. Abrams attached two exhibits to his initial affidavit. The first contained general information about Clarksville for the years 1996 and 1997 regarding matters such as population, tax rates, and agricultural and utility statistics. It also contained information regarding Clarksville's medical community and resources in 1996, such as the number of hospitals, licensed beds, and physicians. The second exhibit contained general information about St. Joseph for the year 2000 regarding matters such as total population, population by age group and race, per capita personal income, location with respect to major metropolitan areas, and transportation resources. It also showed that St. Joseph had one general hospital that was founded in 1984, listed the number of physicians and other medical professionals employed there, and described some of the specialty practices and resources available at the hospital.

between the statistics for Clarksville and those for St. Joseph “essentially contest the *weight* of [the] statements and thus misapprehend the procedural context of this case.” *Stovall v. Clarke*, 113 S.W.3d at 723. These were matters to be tested at trial. *See McDaniel v. CSX Transp., Inc.*, 955 S.W.2d at 266. In excluding Dr. Abrams’s testimony based on the small temporal difference between the statistics for Clarksville and those for St. Joseph, the trial court impermissibly invaded the province of the trier of fact. The trial court therefore abused its discretion in excluding Dr. Abrams’s testimony.

V.

For the foregoing reasons, we hold that the trial court did not err in excluding the testimony of Dr. Krendel but did err in excluding the testimony of Dr. Abrams. The trial court’s grant of summary judgment in favor of Drs. Ely and Ferraraccio and Premier Medical Group is therefore reversed, and the case is remanded for further proceedings consistent with this opinion. We tax the costs of this appeal in equal portions to Ada Travis and her surety and then, jointly and severally, to Blaise Ferraraccio, Thomas L. Ely, and Premier Medical Group, for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., P.J., M.S.